Hudson T. Marsden, a Sole Proprietorship, *and* Robert Strothers. Case 3-CA-9844

January 5, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 6, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hudson T. Marsden, a Sole Proprietorship, Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

I WILL NOT discharge employees for engaging in concerted activities protected under Section 7 of the National Labor Relations Act.

I WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

I WILL offer to Robert Strothers and Ronald Porter immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other privileges enjoyed, and I will make them whole for any loss of pay they suffered as a result of my having discharged them, with interest.

I WILL make Joseph Ruffin and John Cole whole for any loss of pay suffered as a result of my having discharged them, with interest.

HUDSON T. MARSDEN, A SOLE PROPRIETORSHIP

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Rochester, New York, on March 13, 30, and 31, 1981. The charge was filed on June 12, 1980, and amended on July 24, 1980. The complaint was issued on July 25, 1980, alleging that Hudson T. Marsden, a Sole Proprietorship (Respondent), violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel and by Respondent.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent has maintained its principal office and place of business in Rochester, New York, and is in the business of performing pavement construction and related services. Respondent has admitted, and I so find, that during the 12 months preceding the issuance of the complaint, it had provided services valued in excess of $50,000 to the city of Rochester. The record contains evidence, and I so find, that during the 12 months preceding the issuance of the complaint the city of Rochester purchased goods and materials valued in excess of $50,000, which were shipped to Rochester, New York, directly from points outside New York State.

Respondent contends that there is no basis for jurisdiction in this case. In *Siemons Mailing Service*, 122 NLRB 81, 85 (1958), the Board defined indirect outflow as the "sales of goods or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard." The Board also stated

in *Siemons* (*id.* at 85, fn. 12) that "users" shall include an enterprise or organization which is itself exempted from the Board's jurisdiction if its operations are of the magnitude which would justify assertion of jurisdiction were it nonexempt. See *Hoover, Inc.*, 240 NLRB 593, 594 (1979).

I have found that Respondent provided services valued in excess of $50,000 to the city of Rochester and that the city of Rochester purchased goods and materials valued in excess of $50,000 which were shipped to Rochester directly from points outside New York State. Accordingly, I find that Respondent's operations satisfy the applicable jurisdictional standards, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act for the Board to assert jurisdiction herein. See *St. Francis Pie Shop, Inc.*, 172 NLRB 89, 90 (1968).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by terminating four employees, namely, Robert Strothers, Ronald Porter, Joseph Ruffin, and John Cole, for engaging in a concerted work stoppage due to inclement weather. The complaint also alleges that Hudson Marsden, the sole proprietor of Respondent, interrogated an employee by asking him who was the instigator of the work stoppage. Respondent denies that it violated the Act. The issues, accordingly, are:

1. Were the employees discharged for having engaged in a concerted work stoppage.
2. Were the discharges violations of the Act.
3. Did Marsden interrogate an employee as to who was the instigator of the work stoppage.

B. *The Facts*

1. Background

During May 1980 Respondent was replacing sidewalks under contract with the city of Rochester. On May 19[1] Respondent employed a crew of approximately eight employees, consisting of three cement finishers and five laborers. The normal work hours were 8 a.m. to 4 p.m.

2. Reporting for work on May 19

Strothers reported for work around 7:30 a.m. He testified that he had a conversation with Marsden at or around 7:45 a.m., at which time it was raining. Strothers credibly testified that Marsden "asked me about the weather; what did I think. Should we give it a try? And I answered him, yes, give it a try. But, you know if it rains hard we could just give it up." Porter corroborated this testimony. He credibly testified that he reported to work at 8 a.m., at which time it was raining. He stated that "Marsden came out and he asked us what we thought; give it a try or not. So we decided to give it a try."

[1] All dates refer to 1980 unless otherwise specified.

3. Events occurring between 9:30 and 10:15 a.m.

Marsden left the jobsite around 9:30 a.m. and did not return until 10:15 a.m. The normal time for coffeebreak was around 10 a.m. Strothers testified that it was still "drizzling" when it came time for the break. He discussed the weather with the other employees and decided to leave the jobsite. Porter testified that he talked to his fellow employees, Strothers, Cole, Ruffin, and Young, about the weather. He credibly testified:

> After we went to the job site, we started working and I asked the guys; you know, it was beginning to rain a little harder and they were complaining about working in the rain. So I asked if they wanted to continue to work in the rain or go home.

Porter further testified that the employees continued to discuss the rain during their break, which took place around 10 a.m. He stated that it was still raining after the break and, accordingly, they decided to leave.

While Marsden denied that it was raining that morning, the other witnesses corroborated the testimony of Strothers and Porter. Thus, Cole, Respondent's own witness and still an employee of Respondent, testified that it was still "drizzling" at the time the employees left the jobsite. Eldred, an inspector employed by an unaffiliated consulting firm, testified that there was a "light, drizzling rain." Laine, another of Respondent's witnesses, and also still an employee of Respondent, testified that it was drizzling that morning. He further credibly testified "all of the guys got together and decided that it was time to go home because it was raining too hard." He credibly testified that the employees talked about the rain for 10–15 minutes before they decided to leave. In addition, he credibly testified that that afternoon he told Marsden that the employees left the job because it was raining.

I credit the testimony of Strothers, Porter, Cole, Eldred, and Laine and find that on May 19 there was a drizzle or light rain during the relevant period of 8 to 10:15 a.m.[2] I further credit Strothers' and Porter's testimony, corroborated by Laine's credited testimony, and find that the employees discussed the weather conditions at the time of break, for about 10–15 minutes. They then decided to leave the jobsite because of the rain.

4. Events of May 20 and 21

Strothers testified that he came to work the next morning at 7:40 a.m. He stated:

> I went to Mr. Marsden's house and I walked up and he asked me for my license. I asked him why and he just said that he wanted my license. I said that I wouldn't give him my license. I didn't have to show my license to anyone but the police. The conversation went on and he told me, "You will never drive any of my trucks again and, furthermore, you're fired." And that was it.

[2] In addition, Resp. Exh. 2, which is a report of the National Weather Service, shows weather conditions of fog and drizzle in Rochester on May 19.

Porter corroborated Strothers' testimony. Porter also testified that, after Marsden told Strothers that he was fired, he instructed Laine, Young, and Boston to go to work. However, he left Porter, Cole, and Ruffin "standing there."

Porter testified that he reported to work on May 21. When asked whether he had any conversation with Marsden at that time, Porter credibly testified:

> I tried to question him, but he wouldn't give me no answer. We got to work that morning and he gave us our checks, Joe Ruffin, John Cole and Strothers and told us that there was no work; Joe Ruffin, myself and Cole.

Marsden testified that he gave Porter a number of reasons for "letting him go." These included smoking marijuana, drinking, not "operating the truck right," having "three flat tires in two weeks" and "stopping at restaurants to have coffee breaks." With respect to Cole and Ruffin, Marsden testified:

> Q. What reason did you give Cole and Ruffin?
> A. Because I don't have any work for them.
> Q. When did you bring them back?
> A. The following Monday after I had my chance to have a preliminary investigation as to what happened.
> Q. As to what happened about what?
> A. Them walking off the job. A lot of them were under duress and influenced by other people. They had no choice of transportation back to my shop and they couldn't hold or conduct any work on their own. So they were coerced into leaving the job and returning to the shop.

Similarly, when asked why he discharged Strothers, Marsden testified that Strothers punched out the timecards of the other employees and drank on the job. When questioned as to why he had not discharged Strothers and Porter prior to May 19, Marsden replied, "I don't believe I had just cause at that particular time."

I credit Strothers' and Porter's testimony and conclude that they, Ruffin, and Cole were discharged because they walked off the job on May 19. Marsden admitted that prior to May 19 he did not have "just cause" to discharge Strothers and Porter. While Marsden testified that he did not have work for Ruffin and Cole, he conceded that he rehired them after a "preliminary investigation" as to the circumstances surrounding their walking off the job. Marsden thus admitted that their discharge was not, indeed, because of lack of work, but instead it related to their leaving the job on May 19. I conclude that the various reasons given by Marsden for the discharges, such as lack of work, drinking, improper driving, and, in the case of Strothers, failure to furnish his driver's license, were pretextual. I find that the actual reason for the discharges was the employees' leaving the jobsite on May 19.

5. Prior practices concerning working in the rain

Marsden testified that in the past, if it started to rain while the men were working, it was the practice for the men to take shelter in the doorway of a building, on someone's porch, or in the trucks. This was corroborated by Boston, who testified that, in the past, the men waited for up to an hour in the shanty or in the trucks to see if it would stop raining. If it did not stop, Marsden or his son would instruct the men to leave. Laine and Porter similarly testified. The testimony is uncontroverted that neither Marsden nor his son was at the jobsite on May 19, between 9:30 and 10:15 a.m.

Marsden also testified that raincoats and rain pants were available in the storage wagon. He conceded, however, that there were not "enough to go around." On the other hand, Strothers and Porter stated that rain gear was not provided. Cole testified that there were "some" ponchos available but that he had never used them.

Based on the above testimony, I find that in the past the men took shelter when it started raining and remained there for up to an hour, at which time either Marsden or his son would instruct them to leave. On May 19, from 9:30–10:15 a.m., neither Marsden nor his son was at the jobsite.

With respect to whether rain gear was available, Marsden conceded that there was not enough "to go around." I find that some rain gear was available but that the men were not accustomed to using it. It is questionable whether all the men indeed knew that the rain gear was available. In any event, the practice in the past was to take shelter and wait for the rain to stop, rather than use the rain gear.

6. Strothers' request for a loan

Marsden testified that Strothers requested a loan of $650 on May 16 as a security deposit for renting an apartment. Marsden did not refuse to grant the loan but said that "we would see." Marsden further testified that, on, May 19, Strothers asked for an additional loan of $500 to help a relative in Florida. Marsden stated that he refused this latter loan request, at which point Strothers "threw down his pick and walked away." Strothers testified that he requested a loan of $500 on May 16 for purposes of moving to another apartment. He denied, however, having any conversation with Marsden concerning a loan on May 19. In addition, Strothers denied having any relatives who live in Florida but testified that he and Marsden had a discussion on May 19 concerning the riots in Florida.

I credit Strothers' testimony and find that the only request for a loan was that made on May 16 for $500 to be used as a security deposit for the rental of an apartment. I find that Marsden did not refuse to grant the loan but told Strothers that he "would see" whether to grant it.

7. Interrogation

Paragraph IV of the complaint alleges that Marsden asked an employee who was the "agitator" and "instigator" of the May 19 decision to stop work. In this regard, Strothers testified that, after the men walked off the job, Strothers encountered Marsden, at which time Marsden "pulled up and asked me who the instigator was." Marsden denied asking who was the instigator. Laine, whom I regard as a particularly credible witness, testified that

he worked with Marsden the afternoon of May 19. He testified that they discussed the reasons the employees left the job and that Laine told Marsden it was "because it was raining." He denied that Marsden asked him who was the "ringleader."

I find that the General Counsel has not sustained his burden of showing that Marsden asked who was the "agitator" or "instigator." If Marsden was interested in finding that out, it is unlikely that he would not have questioned Laine about it, when they worked together that afternoon. Accordingly, the allegation is dismissed.

C. *Discussion and Analysis*

In *N.L.R.B.* v. *Washington Aluminum Company*, 370 U.S. 9 (1962), the Supreme Court held that the employees were engaged in protected concerted activities when they participated in a work stoppage to protest lack of heat in the plant. The Court held that Section 7 of the Act protects employees' concerted activities to protest unsafe or uncomfortable working conditions. Additionally, the Court held that these Section 7 rights were not dependent on the reasonableness of the employees' protest nor on whether the employees had made a specific demand on the employer to remedy the condition, prior to engaging in the work stoppage. In subsequent cases the Board has reiterated that employees are not required to communicate the reason for their concerted activity to the employer prior to engaging in the activity. See *Audio Systems, Inc.*, 239 NLRB 1316, 1318 (1979). Furthermore, the underlying employee grievances do not have to be reasonable or meritorious in order for the concerted work stoppage to be protected under Section 7 of the Act.[3] See *Bay-Wood Industries, Inc.*, 249 NLRB 403, 406 (1980). The crucial element is that the enployees have engaged in a concerted work stoppage to protest working conditions which they consider unacceptable.[4]

I have found that Respondent's employees, after discussion among themselves, decided to walk off the job because they were unwilling to work in the rain. They were thus engaged in a protected concerted work stoppage to protest uncomfortable working conditions. It is clear under *Washington Aluminum* and its progeny that, when an employer discharges its employees because they have engaged in a concerted work stoppage to protest uncomfortable working conditions, the employer violates Section 8(a)(1) of the Act.

Respondent adduced testimony to show that the employees had previously worked in the rain and that the past practice was to have employees wait in the trucks to see if the rain would clear. Respondent also contends that it was not raining hard on May 19 and that the employees had not complained to Marsden about the weather before embarking on their work stoppage.[5]

The crucial issue is not the reasonableness of the employees' complaint but whether the employees walked off the job because of working conditions which they found uncomfortable and objectionable. I have found that the employees left the job because it was raining. As discussed earlier, the cases hold that employees are not required to make prior demand on the employer, nor are their Section 7 rights dependent on the reasonableness of their protest. Accordingly, the fact that it may not have been raining hard or that in the past they may have worked in the rain does not detract from their Section 7 rights.

I have found Marsden was aware of the reason of the employees' work stoppage. He was told by Strothers as the employees were leaving the worksite and later on that afternoon he was told by Laine that the employees left work because of the rain. I have found that he discharged the four employees because of their work stoppage. I have further found that the various reasons given by Marsden for the discharges, including the failure of Strothers to produce a driver's license, were pretextual. The reason for the discharges was the work stoppage. Inasmuch as the work stoppage was protected by Section 7 of the Act, the discharges of the employees by Marsden constituted a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging Robert Strothers, Ronald Porter, Joseph Ruffin, and John Cole for engaging in a work stoppage because of rainy weather, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondent having discharged several employees in violation of the Act, I find it necessary to order Respondent to offer them full reinstatement to their former positions or, if such positions no longer exist, to substan-

[3] Accordingly, the fact that the employees took shelter in the past to wait out the rain is irrelevant. Similarly irrelevant is the fact that employees of other construction jobs may have continued to do their work on May 19.

[4] Respondent argues that the work stoppage was engineered by Strothers who was disgruntled because his request for two loans was denied. To the contrary, I have found that Strothers' only request for a loan was on May 16 and that request was not refused. Instead, Marsden said that he would consider the matter. In addition, the fact that Strothers may have had an additional personal reason for leaving the jobsite does not deprive the work stoppage of its concerted character or protection under Sec. 7. See *Kendick Engineering, Inc.*, 244 NLRB 989 (1979).

[5] In this connection, it is uncontroverted that from 9:30 until 10:15 a.m. neither Marsden nor his son was at the jobsite. Accordingly, even had the employees desired to give advance notice of their intention to leave work, there was no one to whom they could have given such notice.

tially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered.[6]

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Hudson T. Marsden, a Sole Proprietorship, Rochester, New York, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Robert Strothers and Ronald Porter immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in the section above entitled "The Remedy."

(b) Make whole Joseph Ruffin and John Cole for any loss of earnings, in the manner set forth in the section above entitled "The Remedy."

(c) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.

[6] Ruffin and Cole were reinstated on May 26, 1980.

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."